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Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-972

WESTVACO CORPORATION, PACKAGING CORPORATION OF AMERICA and GEORGIA-PACIFIC CORPORATION

Petitioners,

vs.

ADAMS EXTRACT COMPANY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT WILLAMETTE INDUSTRIES, INC. IN OPPOSITION TO MOTION OF CERTAIN RESPONDENTS TO DISMISS THE WRIT OF CERTIORARI

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The motion of certain defendant-respondents, in league with plaintiff-respondents, to dismiss the writ of certiorari granted in this case fails to identify any change in the posture of this case which warrants dismissal. Although one petitioner, Westvaco Corporation, has moved to dismiss its petition, Georgia-Pacific Corporation ("G-P") and Packaging Corporation of America ("PCA"), the other two petitioners, are determined to pursue the case. Because opt-out actions are still pending, and because settlements by PCA and G-P with the class action plaintiffs have not been finally approved, this appeal is not moot.

Further, The Mead Corporation ("Mead") has filed and intends to press a claim for contribution against Willamette and other defendants. In view of the recent verdict against Mead, which plaintiffs estimate may result in a billion-dollar judgment,* the issue of proportionate liability in this litigation is more alive, more sharply defined and more pressing than ever before. As a technical and practical matter, the case is neither moot nor otherwise inappropriate for consideration at this time.

Movants' effort to dismiss the writ is a tacit recognition that this Court's decision may have a direct impact on all parties. The pendency of the opt-out cases (which Willamette has not settled), the possibility that settlements with the class may be vacated on appeal, the contribution claim by Mead, and the indisputable conflict in the circuits all give Willamette a vital interest in the Court's consideration of the proportionate liability issue in this case. The demonstrated consequence of the present uncertainty about proportionate liability is that defendants are coerced to settle for substantial sums wholly unsupported by the merits of the claims against them.**

As a settling defendant which the jury in the trial against Mead found innocent of conspiracy,*** Willamette has first-hand knowledge of the inequity which pervaded the settlement process. Failure to review petitioners' claims now leaves Willamette subject to a repetition of this coercion in the opt-out cases, and leaves open the possibility of facing it again in the class action if petitioners' pending settlements

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*The Houston Post, September 14, 1980, p. 1.

**The most recent illustration of this is the settlement by Westvaco Corporation for nearly $1 million. Both Judge Singleton and the jury stated they would have found Westvaco innocent had it not settled. "Motion to Dismiss By Westvaco Corporation," at 2-3. Nevertheless, Westvaco "felt compelled to settle in the absence of an established right to contribution . . ." *Id.* at 1.

***The form of special verdict submitted to the jury in the Mead trial required the jury to state which of thirty-three original defendants participated in the conspiracy. The jury found that Willamette was not a member of the conspiracy.

are not approved or if settlements are vacated on appeal. The contribution claim by Mead, and possible contribution claims by other defendants in the event their settlements are reversed by the Fifth Circuit, enhances Willamette's concern that this Court address now the issue of proportionate liability.

Further, the clear split of authority in the circuits encourages forum-shopping, and has contributed to the uncertainty in the law. There is no reason to put off any longer a resolution of that uncertainty. Respondent Willamette Industries, Inc. therefore urges that the motion to dismiss be denied, or, at a minimum, deferred to consideration of the merits.

1. PETITIONERS' RECENT SETTLEMENTS DO NOT MOOT THIS APPEAL.

Clearly, petitioners' tentative settlements in the class action cases do not moot proportionate liability claims in the opt-out cases.* Like the class action, those cases involve billions of dollars in sales and enormous damage claims. With respect to the opt-out cases, petitioners—and Willamette as well—remain nonsettlors who would benefit from a rule of proportionate liability.

Movants attempt to bury this dispositive fact in a footnote (Motion at 9-10 n.9.), and take the position that the opt-out cases are moot because the record on them is "virtually nonexistent" and because the question of proportionate liability in those cases did not play a prominent role in the arguments and decisions below. (*Id.*) This contention is both novel and nonsense. First, the claims in the opt-out cases are identical to those in the class action, and all discovery in the class case

*Those cases are properly before the Court. G-P's motion to assert claims for contribution and claim-reduction on its face applies to all actions, including the opt-out cases. (J.A. 231). At the time of the motion, G-P had already filed answers in four opt-out cases and had been named and served in several others, and the motion clearly covered those opt-out cases. Pretrial Order No. 13 is captioned "all cases" and denied petitioners' contribution claims and claim-reduction defenses in the opt-out cases as well as the class action portion of M.D.L. 310.

applies to the opt-out actions. The proportionate liability issue there is precisely the same as in the class action case. Second, a live controversy does not become moot simply because some aspects of the record on appeal are more fully developed than others.

Even if the opt-out actions were not before the Court, the case would still present a justiciable issue. An appeal is not moot if the petitioner's attempt to resolve its dispute with respondents remains subject to unresolved contingencies. Here, petitioners' settlement agreements with the class action plaintiffs have not received final approval. Indeed, plaintiff-respondents have never even sought final approval of those settlements. Further, all of the settlements entered into by respondents have been challenged on appeal, and petitioners' settlements, if ever finally approved, may also be subjected to appellate review. In this uncertain posture, petitioners' asserted right to contribution and claim reduction against Willamette is decidedly not moot. *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 465 n.3 (1978).

The uncertain posture of petitioners' settlements brings this case squarely within the standard established in *Mancusi* v. *Stubbs,* 408 U.S. 204 (1972). There, Stubbs had been sentenced under New York's multiple offender statute on the basis of a prior conviction in Tennessee. On Stubbs' appeal from the denial of a writ of habeas corpus, the Second Circuit Court of Appeals held that the Tennessee conviction was constitutionally infirm and could not be used as a basis for his sentence. The State appealed to this Court. In the meantime, Stubbs was resentenced to the same term on the basis of a Texas conviction then on appeal in the Texas state courts. This Court held that the State's appeal was not moot because it had a continuing interest in the availability of the Tennessee conviction "until it can be said with certainty" that the new sentence, based on the Texas conviction, was valid. 408 U.S. at 206.

G-P and PCA similarly have a live, justiciable interest in contribution and claim reduction "until it can be said with certainty" that their settlements are final. G-P and PCA

sharply disagree both with plaintiffs and with the moving defendants on the fundamental question of whether a rule of proportionate liability applies in this case, and so long as the possibility remains that petitioners' settlements may not receive final approval, or that petitioners' or any other defendant's settlements may be upset on appeal, there is an "existing dispute [between the parties which] makes this a live controversy." *Buffalo Forge Co.* v. *United Steelworkers of America,* 428 U.S. 397, 403 n.8 (1976).

2. The Claim Reduction Issue is Unquestionably Before the Court.

The second prong of movants' argument contends that claim reduction is not before the Court because the Fifth Circuit did not address the issue. The fallacy in that reasoning is that the Fifth Circuit rejected *any* rule of proportionate liability and accordingly had no cause to consider claim reduction. The issue is and always has been, however, an integral part of petitioners' contribution claim. The simple fact that claim reduction may also arise in a different procedural context (*i.e.,* as an affirmative defense) does not cause it to disappear as an issue properly and necessarily before the Court.

Contribution and claim reduction are corollary elements of a unified rule of proportionate liability. To separate them out as distinct issues to be considered in different cases is to ignore both petitioners' claims and the realities of this case. Where, as here, the issue of proportionate liability arises in the context of settlements, a coherent and comprehensive analysis of contribution cannot be done without consideration of claim reduction.

3. Recent Developments Have Crystalized the Issues, and Make a Decision in This Case Even More Appropriate.

Just as movants' technical argument is deficient, their suggestion that the case is otherwise inappropriate for review ignores practical reality. The jury verdict against Mead, which may result in "one of the largest [judgments] in

American legal history,"* brings a sense of urgency and immediacy to this case which none of movants' rhetoric can conceal. The verdict against Mead and petitioners' tentative settlements do not, as movants argue, blur or obliterate the focus of the suit or render this Court's judgment "potentially immaterial." (Motion at 11.) On the contrary, the recent events have heightened movants' concern that a decision in this case will have a very material impact. It is precisely because the case is not moot, and because this Court's decision may have a direct and substantial impact on movants' pecuniary interests, that they now seek to have the writ dismissed.

Such a transparent attempt to avoid a decision where the issues are so sharply drawn should not be countenanced. Delay in deciding the issues of contribution and claim-reduction in antitrust cases will only perpetuate and deepen the conflict among the circuits and will lead to further forum-shopping and other tactical maneuvering by parties seeking to exploit the conflict. Further, the Court has decided to consider one aspect of the contribution issue in *Northwest Airlines, Inc.* v. *Transport Workers Union,* 606 F.2d 1350 (D.C. Cir. 1979), *cert. granted,* 48 U.S.L.W. 3813 (June 16, 1980) (No. 79-1056). Certiorari was granted in this case and it was set for argument in tandem with *Northwest Airlines* because together these cases present the broad spectrum of considerations necessary for the Court to decide the issues associated with proportionate liability in a meaningful, comprehensive fashion. Recent events have not undercut that rationale in any way. The conflict in the circuits must be resolved, and dismissal of this case will not obviate the necessity of addressing the issues it raises.

CONCLUSION

The inequity in holding a single company liable for damages attributable to an entire industry is graphically illustrated in this case, and movants' litany of citations cannot overcome the fact that the parties before the court

*"The Houston Post," September 14, 1980, p. 1, 27A.

have substantial, adverse and live interests at stake, and disagree sharply on the substantive legal issues which that inequity raises and which this Court must resolve. Under such circumstances, the case satisfies the justiciability requirements of Article III of the Constitution. The decision to hear this case was a sound one, and recent developments have simply reinforced the propriety of that decision. Accordingly, the motion to dismiss should be denied.

DATED: October 6, 1980

Respectfully submitted,

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